United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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THE SANKO STEAMSHIP CO., LTD., :

Plaintiff-Appellant, : DOCKET NO. 76-7060

-against- :

NEWFOUNDLAND REFINING COMPANY, LIMITED, NEWFOUNDLAND REFINING COMPANY LIMITED U.S.A., PROVINCIAL BUILDING COMPANY LIMITED, PROVINCIAL REFINING COMPANY LIMITED, PROVINCIAL HOLDING COMPANY LIMITED AND SHAHEEN NATURAL RESOURCES COMPANY, INC., :

Defendants-Appellees. :

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PETITION FOR REHEARING EN BANC

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT:

The Sanko Steamship Co., Ltd., plaintiff-appellant above named, presents this, its petition for a rehearing en banc in the above entitled cause, and in support thereof respectfully states:

I.
FACTS

On the 17th day of February, 1976, plaintiff instituted an action in admiralty pursuant to Rule 9(h) of the Federal Rules of Civil Procedure against defendants for failure to pay charter hire in the sum of $8,112,323.68 due it under three (3) charter parties dated August 8, 1972, between plaintiff and defendant NEWFOUNDLAND REFINING COMPANY LIMITED (hereinafter "NR.C."). On the same day plaintiff obtained from the aforesaid Court (Whitman Knapp, D.J.) pursuant to Rule B(1) of Supplemental Rules for Certain Admiralty and Maritime Claims, and Section 6201 of the Civil

Practice Law and Rules of the State of New York (C.P.L.R.), a temporary restraining order against defendants and the SUMITOMO BANK, LTD., EUROPEAN AMERICAN BANK & TRUST CO. and MANUFACTURERS HANOVER TRUST COMPANY preventing defendants from removing, releasing or secreting the cumulative amount of $3,000,000 from accounts which defendants had at said banks, together with an order to show cause as to why plaintiff was not entitled to an attachment of funds and/or credits in any and all accounts maintained by defendants at said banks in the aforesaid cumulative amount

Plaintiff sought the attachment of defendant's assets pursuant to a temporary restraining order with an order to show cause as to why an order of attachment should not be granted because of the decision in the case of Bert Randolph Sugar v. Curtis Circulation Company, 383 F.Supp. 643 (S.D.N. Y. 1974), which has been enterpreted to suggest that an attachment pursuant to Section 6201 of the New York C.P.L.R. could be invalid unless the proceeding was carried out on notice.

Said temporary restraining order, which was returnable at 3:00 P.M. on February 20, 1976 before Judge Knapp, also provided:

> "The return date herein has been set without prejudice to an application for acceleration thereof by defendants."

On February 17, 18 and 19, 1976, the aforesaid banks and defendants were personally served with copies of the temporary restraining order and late in the afternoon of February 18, 1976, counsel for plaintiff was advised by counsel for defendants that the return date, pursuant to the above quoted language, had, at their request, been accelerated to 10:00 A.M. on February 19, 1976.

Prior to March 4, 1976, several hearings were had before Judge Knapp and before this Court that are not germaine to this appeal. During the period, however, plaintiff deleted Manufacturers Hanover Trust Company from the temporary restraining order, as it held no funds or credits of defendants but also during this period while the temporary restraining order was in effect, counsel for defendants advised that the Sumitomo Bank, Ltd. had removed $905,739.52 from one of the defendant's account at said bank without court authorization. On March 4, 1976, a hearing was held before Judge Knapp who entered a judgment dated the same day, dismissing plaintiff's complaint and vacating the temporary restraining order on the authority of the decision of The United States Supreme Court in THE BREMEN v. ZAPATA OFF-SHORE COMPANY, 407 U.S. 1 (1971).

Plaintiff thereafter filed an expedited appeal and this Court in its opinion of April 15, 1976, affirmed the judgment of the District Court on the opinion of the Honorable Judge Knapp and on the authority of THE BREMEN v. ZAPATA OFF-SHORE CO., supra.

II.
Issue Presented

The only issue on this petition for reargument en banc is the correctness of the ruling of the District Court and of this Court that the District Court was required to dismiss the complaint and vacate the temporary restraining order by reason of THE BREMEN v. ZAPATA OFF-SHORE CO., supra.

III.

It is submitted that the case of THE BREMEN v. ZAPATA, supra, does not, as this Court has assumed in its ruling

herein, require the dismissal of plaintiff's complaint and vacating the temporary restraining order served on the Sumitomo Bank Ltd. and the European American Bank & Trust Co. wherein defendants have assets. As was stated in plaintiff-appellant's brief to this Court, the decision of THE BREMEN v. ZAPATA is clearly distinguishable from the case at bar. The procedural posture of the ZAPATA decision was that Zapata instituted an action in the United States District Court in Tampa, Florida in rem against the tug BREMEN and against its owner, Unterweser, in personam for breach of a towage contract. Unterweser filed a bond to have the BREMEN released and thereafter moved, pursuant a forum selection clause contained in the towage contract, to have Zapata's action dismissed for forum non conveniens or, in the alternative, to have Zapata's action stayed pending resolution of the dispute in the selected forum, England.

In order to further protect himself Unterweser then instituted an action in England against Zapata alleging breach of the towage agreement. Zapata appeared and contested that court's jurisdiction, but British court ruled it has jurisdiction over ZAPATA.

Meanwhile, the District Court in Tampa had yet to rule on both of Unterweser's motions and as the time in which Unterweser could file a limitation of liability action had almost expired, Unterweser filed a protective limitation of liability action with the requisite bond for the value of the tug.

Thereafter, the District Court ruled against Unterweser on his motions to dismiss or stay Zapata's action.

Unterweser appealed this decision and the same was affirmed by the Fifth Circuit.

Unterweser then moved the District Court to stay the limitation proceedings pending a determination of the issues by the English Court and Zapata also moved, seeking to enjoin Unterweser from further prosecuting its action in London. The District Court in Tampa denied Unterweser's motion while granting Zapata's which action was affirmed on appeal and reaffirmed by a divided court after rehearing en banc. (428 F.2d 888 and 446 F.2d 907).

The Supreme Court granted certiorari and ruled that a forum selection clause in an agreement which was freely negotiated is prima facie valid absent a showing by one of the parties that it would be unreasonable or unjust to enforce the same or that the clause was invalid for reasons such as fraud or unequal bargaining positions.

The Supreme Court also gave its "policy" reasons for the enforcement of forum selection clauses, stating:

> "Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left open to any place were the BREMEN or Unterweser might happen to be found. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce and contracting."
> (407 U.S. at p. 13)

It is submitted that the Supreme Court in ZAPATA was announcing two and only two principles. One, that due to expanding international trade, forum selection clauses serve the purpose of letting the parties know in advance where any disputes shall be resolved; and two, that such clauses will, therefore, be held valid absent a showing that

to do so would be unfair or unreasonable or that such a clause is unenforceable for reasons such as fraud or over-reaching.

Clearly, the Supreme Court did not decide the issue whether one party to an agreement containing a foreign forum selection clause, assuming it was valid, was precluded from maintaining an action outside the selected forum for the purpose of obtaining security pending determination of the dispute in the selected forum. The procedural history of the ZAPATA case unarguably establishes this fact. The District Court in Tampa had simply declined to dismiss the case for forum non conveniens and the question of a stag was not before the Court of Appeals or the Supreme Court. Accordingly, neither the Court of Appeals for the Fifth Circuit nor the Supreme Court were dealing with the question of whether a stay would not have been proper and would have accomplished the "policy" purposes stated by the Supreme Court.

Furthermore, while it is true that Unterweser had offered throughout the ZAPATA litigation to allow its security to stand in the United States pending a resolution of liability in the English Court, and while it is also correct that Unterweser on remand to the District Court moved only to stay Zapata's action thus allowing its security to stand, this is not determinative of the issue herein.

The issue here is whether the party instituting the action for security has the right to do so outside the selected forum and thereafter have the action stayed once security is obtained, pending a resolution of the dispute in the selected forum.

It is submitted that a forum selection clause is inserted in agreements such as the charterparties so that the parties to the agreement know in advance where disputes will be resolved; but this is not to say that by the insertion of such a clause the parties have agreed to waive rights to obtain security elsewhere.

In this instance plaintiff, a Japanese corporation, and the defendant charterer, NRC, a Canadian corporation, agreed that all disputes arising out of the Charter would be resolved in London by arbitration or litigation. This was the sole agreement. The parties did not agree that if a dispute arose out of the charterparties that they would be precluded from obtaining security pending resolution of an action in London. Clearly, if the parties had intended to so drastically do away with the traditional maritime remedy for security, they would have so stipulated. Accordingly, it is submitted that this Court should not have ruled that plaintiff tacitly gave up substantive admiralty rights.

IV

Rule B of the Supplemental rules for certain admiralty and Maritime claims provides that if one has a maritime claim in personam, as in the instant case, the party aggrieved may attach the defendant's "goods and chattels, or credits and effects" if the defendant is not found within the district.

It is respectfully submitted that by affirming the District Court's decision, this Court has impliedly held that the traditional Writ of Foreign Attachment in admiralty or the use of State Court remedies provided for by Supplemental Rule B cannot be used where the contract contains a

foreign forum selection clause. In other words, security will no longer be allowed in that large body of cases where the maritime contracts contain a foreign forum selection clause. If this rule should pervail it would seem that parties to maritime contracts might be well advised to forego the luxury of forum selection clauses if possible, although the Supreme Court stated in ZAPATA that such clauses are "an indispensable element in international trade, commerce and contracting". It is submitted that the Supreme Court in ZAPATA did not intend to curtail their use.

Moreover, attention should be given to the fact that large portions of United States exports and imports are carried in foreign vessels under charterparties containing foreign forum clauses. Accordingly, if the remedies provided by Supplemental B are unavailable, the United States exporters and importers will be denied security and any judgments which they may later obtain in the foreign forums may be worthless. Although the plaintiff in this instant case happens to be Japanese, the Court should take into consideration the fact that the great majority of potential plaintiffs seeking to use Supplemental Rule B will be Americans. Heretofore the courts in this country, while upholding foreign forum selection clauses, have permitted suits to be started for the purpose of obtaining security. Kooperativa Forbundet, Stockholm v. Vaasa Line Oy, Partenreederei M.S., Ursula Jacob, und the S.S. Ursula Jacob, etc. 1975 A.M.C. 1972 (unreported elsewhere), Garris V. Compania Maritima San Basillio, 261 F.Supp. 917 (S.D.N.Y. 1966 aff'd. 386 F.2d 517 (2nd Ar. 1969); Brillio V. Chaudria (U.S.A.) Inc. 215 F.Supp. 520 (S.D.N.Y. 1963); Hatzaglou v.

Asturias Shipping Company, S.A. 193 F.Supp. 195 (S.D.N.Y. 1961); Danielsen v. Entre Rios Rys. Co., 22 F.2d 326 (D.C. Md. 1927) (arbitration in England); The Quarrington Court, 25 F.Supp. 665 (D.C.N.Y. 1938) (arbitration in England); Uniao De Transportadores, etc. v. Companhia De Navegacao, etc., 84 F. Supp. 582 (D.C.N.Y. 1949) (arbitration in Portugal); International Refugee Organization v. Republic S.S. Corp. 93 F.Supp. 798 (D.C. Md. 1950) appeal dismissed 189 F. 2d 858 (4th Cir. 1951) (arbitration in England); Fox v. The Giuseppe Mazzini, 110 F.Supp. 212 (D.C.N.Y. 1953) (arbitration in England); Mannesmann Rohrlei Tungsbau v. S.S. HOWALDT, 254 F. Supp. 278 (S.D.N.Y. 1965) (arbitration in Holland); Konstantinidis v. SS TARSUS, 248 F.Supp. 280 (D.C.N.Y. 1965) aff'd 354 F. 2d 240 (2d Cir. 1965).

It is submitted that had the Supreme Court intended to overrule this well established case law, it would have done so expressly.

V.

The foreign forum selection clause in this instant case provides that either party may elect to have the dispute referred to arbitration in England rather than to the British Courts. This privilege of election does not affect the application of Supplemental Rule B.

Section 8 of the Arbitration Act, 9 U.S. Code provides if an agreement contains an arbitration clause and if one party thereto has a claim which is otherwise cognizable in admiralty, such a party may institute an arbitration proceeding "by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings." (9 U.S.C.A. Section 8).

The foregoing clearly allows a party to an agreement containing an arbitration clause to institute the arbitration proceedings by filing an action in rem against

a vessel or instituting an action seeking to attach other property of the defendant. Accordingly, if a claim is cognizable in admiralty the plaintiff may institute an action and seek to attach assets of the defendant pursuant to a Writ of Foreign Attachment or by invoking a State's attachment statute . (Supplemental Admiralty Rule B)

Assuming one chooses to institute an arbitration proceeding in accordance with Section 8, the Court can, on its own initiative, stay plaintiff's action and order the parties to arbitration or the plaintiff may move under 9 U.S. Code 3 to stay its own action and request the Court to order the parties to arbitration.

This very situation occurred in Commercial Metals Co. v. International Union Marine Corp., 294 F.Supp. 570 (S.D.N.Y. 1968 Mansfield, J.) which involved an action for breach of a charterparty. The plaintiff had chartered the vessel S.S. GILIA from defendant and said charter had a clause providing all disputes arising thereunder would be submitted to arbitration in New York.. Defendant breached the charter and plaintiff libelled the ship in the state of Washington but failed to mention the arbitration clause in the complaint or to reserve its right to arbitrate the dispute. Defendant posted security to have its vessel released and by stipulation the action was transferred to the District Court, Southern District of New York. Plaintiff thereafter filed an amended complaint in the District Court, Southern District of New York expressly reserving its right to arbitrate, and notified defendant that it had nominated an arbitrator and requested defendant to nominate an arbitrator in accordance with the arbitration clause contained in the charter. The defendant refused to nominate an arbitrator and plaintiff moved the court for an order desig-

nating an arbitrator, directing that arbitration proceed and staying all other proceedings until the arbitration was completed.

The Court held that plaintiff, by filing its amended complaint reserving its right to arbitrate, had complied with the requirements of 9 U.S. Code 8, and therefore, the Court granted plaintiff's motion and stayed all further proceedings pending the outcome of the arbitration while retaining the security obtained.

Clearly, the present decision overrules the Commercial Metals Co. v. International Union Marine Corp. in cases where the arbitration is to be outside of New York.

It is obvious that if Bremen v Zapata precludes the institution of suit in the Courts of the United States, property cannot be attached under an order or writ of the Federal Courts although that remedy is expressly conferred by 9 U.S. Code 8.

To emphasize this point, heretofore, under the facts of this case plaintiff could have instituted suit in the Southern District, reserving the right to arbitrate, obtained an attachment and thereafter nominated its arbitrator in London. It would have then moved under Commercial Metals Co., Supra, to stay the action and have the court direct the defendant to proceed to arbitration. Such a procedure is now precluded by the instant decision.

VI

It is respectfully submitted that the decision of the District Court which this court has affirmed is contrary to well settled case law, and in derogation to Supplemental Admiralty Rule B and to Section 8 of the Arbitration Act, 9 U.S. Code 8. The decision, moreover,

is of great general importance and is prejudicial to the interests of American exporters, importers, charterers and others in the maritime field.

WHEREFORE for all the reasons set forth it is respectfully requested that this Honorable Court grant plaintiff's motion for reargument en banc.

DATED: NEW YORK, NEW YORK
APRIL 29, 1976

Respectfully submitted,

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